

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20544

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AUG 25 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Rules and Regulations)

Implementing the Telephone)

Consumer Protection Act of 1991)

To The Commission)

CG Docket No. 02-278

PETITION FOR RECONSIDERATION

The Independent Insurance Agents and Brokers of America ("IIABA")¹ hereby respectfully requests reconsideration of the rules set forth in the Report and Order of the Federal Communications Commission ("Commission")² adopted June 26, 2003 in the matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 ("TCPA") published in the Federal Register on July 25, 2003, with an effective date of August 25, 2003. The Report and Order was amended by the Commission's Order on Reconsideration³ adopted on August 18, 2003. The Order on Reconsideration ordered a limited stay with respect to the effective date of the Commission's determination that an established business relationship will no longer be sufficient to show that an individual or business has given express permission to receive unsolicited facsimile advertisements, as well as the signed, written consent statement requirements of the amended regulations⁴. The determination with respect to the repeal of the

¹ Founded in 1896, IIABA is the nation's oldest and largest national association of independent insurance agents and brokers, representing a network of more than 300,000 agents, brokers and their employees nationally. Its members are businesses that offer customers a choice of policies from a variety of insurance companies. Independent agents and brokers offer all lines of insurance—property, casualty, life, health, employee benefit plans and retirement products.

² CG Docket No. 02-278, FCC 03-153, rel. July 3, 2003.

³ CG Docket No. 02-278, FCC 03-208, rel. Aug. 18, 2003.

⁴ 47 C.F.R. § 64.1200 (a)(3)(i).

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established business relationship exemption and the implementation of the signed, written consent requirements of the amended regulations were effective August 25, 2003 under the terms of the July 25, 2003 Report and Order. The Order on Reconsideration has moved the effective date of these provisions of the Report and Order to January 1, 2005.

BACKGROUND

The IIABA represents over 300,000 independent insurance agents and brokers across the United States and is the largest trade association representing insurance agents in the nation. Members belong to 51 state and District of Columbia associations. IIABA is the national umbrella organization for the independent state affiliates. Membership in the state affiliates by local, independent agents and brokers is voluntary.

The IIABA and its independent state affiliates use telephone facsimile technology to communicate with their members. Typically, the IIABA and the state affiliates use broadcast facsimiles to alert and notify members about scheduled meetings, programs and conventions. In addition, facsimiles are commonly used to notify members of continuing professional education seminars and courses, course materials, books and other insurance business products and services. Membership renewal notices and reminders are also commonly transmitted to members by facsimile. Absent clarification and limitation that might emerge from the Commission's reconsideration process, the overly broad definition of unsolicited commercial advertisements promulgated in the pending Report and Order appears to apply to these membership-related facsimile communications⁵.

⁵ The IIABA strongly endorses and commends for the Commission's careful consideration the Petition for Emergency Clarification, filed July 25, 2003, by the American Society of Association Executives ("ASAE") in particular the substantive discussion therein of the non-commercial nature of facsimile communications.

DISCUSSION

McCarran-Ferguson

The IIABA urges the Commission to revisit its discussion and determination in the Report and Order with respect to the interplay between the McCarran-Ferguson Act⁶ and the Telephone Consumer Protection Act of 1991. While we will not reiterate at length the comments submitted by the American Council of Life Insurers ("ACLI"),⁷ IIABA fully endorses and supports the views and analysis of the ACLI on this important question.

The gist of the ACLI's view and analysis is that the insurance industry should not be subject to the TCPA because the plain language of that statute leaves little room for doubt about the intent of Congress with respect to leaving the regulation of the business of insurance to the states.

The Commission, on the other hand, maintains that consumer privacy protection is compatible with the states' regulatory interest in governing the business of insurance. Regrettably, this view would justify all manner of federal consumer interest regulation of the insurance business directly contrary to the expressed intention of Congress in the McCarran-Ferguson Act. There is no "compatibility" standard in McCarran-Ferguson, to divine one here would be to flip the presumptive intent of that legislation on its head.

Finally, we strongly urge the Commission to reconsider its determination that exempting the insurance industry from liability under the TCPA would confuse consumers and interfere with protections provided by that Act. Based on the record established by submissions before the Commission, we believe that

between tax-exempt organizations and their members in the legitimate furtherance of their tax exempt activities

⁶ 15 U.S.C. § 1012

⁷ ACLI Letter to Commission, May 5, 2003, Further Comments at 2-3

substantive, extremely important rights and privileges enjoyed by insurance consumers will be imperiled by the Commission's Report and Order. Particularly in regard to the Commission's do not fax rules, a strong case can be made that, from a consumer standpoint, more harm than good will be done since it would inhibit the insurance agent's ability to provide effective and often time-critical service for his or her client.

Where the Commission itself admits that this is a close question⁸, deference to the Congressionally mandated scheme of state regulatory primacy is the most judicious default. We do not take issue with the Commission's intent to raise this issue in its Report to Congress, as required by the Do-Not-Call Act.⁹ We simply believe the Commission should refrain from applying this rule, and then only later bringing its perception of a statutory ambiguity to the attention of Congress.

Established Business Relationship

Notwithstanding our comments regarding McCarran-Ferguson and the action taken by the Commission in the Order of Reconsideration, IIABA is concerned about the Report and Order's wholesale repeal of the established business relationship ("EBR") exception with regard to the do not fax rules. Although we acknowledge that the Commission raised the question of the EBR constituting requisite consent to receive unsolicited facsimile advertisements in its 2002 Notice¹⁰, we do not believe there was adequate advance notice that the Commission was considering outright repeal of the EBR in the context of voluntary, dues-paying tax-exempt membership organizations. Coupled with the overly broad definition of unsolicited commercial advertisement now encompassing routine transmissions between tax-exempt associations and their members, the IIABA believes that inadequate notice was provided to justify such sweeping changes to the existing regulatory framework.

⁸ CG Docket No. 02-278, FCC 03-153, Report and Order at ¶ 53.

⁹ Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557 (2003), 15 U.S.C. § 6101.

¹⁰ 2002 Notice, 17 FCC Rcd at 17482-83, ¶¶ 38-39.

The IIABA believes the Commission had ample legislative regulatory authority for the 1992 determination¹¹ that an established business relationship provides an appropriate exception from the do not fax rules. In addition to legislative history¹² that explicitly acknowledges Congress' awareness of the need for businesses to maintain an ability to contact existing customers, a strong presumption exists that during the more than ten year life of the EBR regulatory exception Congress has given its tacit consent to this common sense rule. In fact, as late as March of this year Congress had an opportunity to legislate any repudiation of the long-standing EBR exception and elected not to do so.¹³

We recommend that the Commission use the interstice provided by the Order for Reconsideration to revisit the EBR exception rules and find workable solutions that do not impose a regulatory straitjacket on tax-exempt organizations and their members. Beyond the issue of an implicit EBR existing between a tax-exempt association and its voluntary members, it is our view, particularly with respect to insurance agent/consumer transactions, that the inconvenience, confusion and in many cases actual harm visited upon the insuring public by the new rules will far outweigh the consumer privacy objectives of the TCPA.

Other Substantive Issues

The IIABA membership has expressed concern over the impact of the do not call rules as set forth in the Report and Order to the extent those rules make no allowance or exception for referrals. The insurance agency and brokerage business is a personal, consumer-oriented business that relies heavily on reputation, word-of-mouth and referrals. It is, as our membership bears out, by and large, the prototypical Main Street America small business enterprise. In IIABA's *2002 Agency Universe Study*, a survey sent to all independent insurance agents and brokers, 87% of those surveyed indicated that they received referrals from other customers and that 37% of all of their new accounts resulted from those referrals.

¹¹ Report and Order, In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 FCC 8752, 8779 (1992).

¹² H.R. Report 102-317, 1991 WL 245201 at 13-14.

¹³ Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557 (March, 2003).

There are a myriad of very common situations where a referral and telephone call/facsimile message serve the immediate and valuable needs of consumers in the insurance marketplace. These transactions often have their greatest value when there is no pre-existing EBR. A simple example illustrates the problem: a parent contacts an insurance agent, perhaps one with which she has an established business relationship, and asks the agent to fax a binder for renter's insurance coverage to her son who is moving into an off-campus apartment in another city. Under the Commission's rules, this would be a violation of the TCPA and regulations because (a) there is no longer an EBR exception for facsimile transactions, and (b) the referral call or facsimile is treated as an unsolicited commercial advertisement - despite the fact that the parties to the transaction desired and invited the contact by the insurance agency. Agents also need to provide timely information to customers about new and updated or amended products or services that would better suit their insurance needs.

The IIABA and its members are also concerned about the effect the Report and Order will have on their business dealings when it is sometimes difficult or impossible to tell if they are contacting a business or residential line in cases of home businesses, particularly in cases where the agent or broker uses call back technology (such as *69) to return an inquiry. The safe harbor should be liberalized significantly to accommodate this and other good faith commercial activities that have the potential of running afoul of the new rules. We urge consideration of a generous *de minimis* allowance for good faith calls that accidentally violate the do not call regulations. It should not be difficult to set an appropriate threshold that protects small businesses such as independent insurance agencies, while at the same time not forgiving high volume violations by automated telemarketing enterprises.

Finally, the IIABA is far less sanguine than the Commission that their small business members will be able to absorb the expense, manpower and training, and opportunity costs that compliance with this set of regulatory strictures will require. Significant costs will be incurred just to put a small business such as an

insurance agency in a position to avail itself of the safe harbors when the inevitable inadvertent or mistaken call or facsimile occurs. The IIABA believes that the pendulum has swung too far in one direction in this set of rules and urges the Commission to seek a more balanced, practical set of rules that targets abusive telemarketing to meet the needs of the public.

Conclusion

IIABA respectfully requests that the Commission reconsider its decision in the Report and Order regarding the applicability of the TCPA to the insurance industry in light of the express Congressional intent embodied in the McCarran-Ferguson Act to leave regulation of the business of insurance to the states.

If the Commission is unwilling to give such deference to the long-established McCarran-Ferguson preemption framework, then the IIABA respectfully requests that the Commission reconsider its decision to repeal the established business relationship exception with regard to telephone facsimile messages and return to the status quo *ante*.

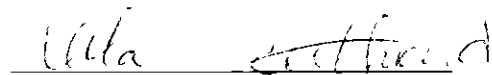
IIABA also urges the Commission to reconsider its decisionmaking in its Report and Order (FCC 03-153) and make a determination that facsimile communications by tax exempt organizations conducted consistent with and in furtherance of the organization's tax exempt non profit purposes are non-commercial and not considered within the statutory definition of "unsolicited advertisement."

IIABA respectfully requests that the Commission make a reasonable exception to the do not call/do not fax rules for referrals made by an existing customer, friend, family member or acquaintance.

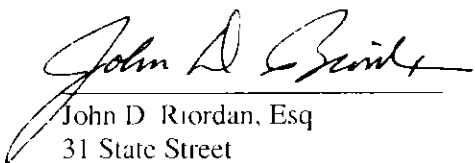
And finally, IIABA respectfully requests that the safe harbor be liberalized significantly to accommodate calls to home businesses and other good faith commercial activities that have the potential of running afoul of the new rules

Respectfully Submitted,

Independent Insurance Agents and Brokers of America



Maria L. Berthoud
Senior Vice President
Independent Insurance Agents and
Brokers of America
412 First Street, S E
Washington, D.C. 20003
202-863-7000



John D. Riordan, Esq
31 State Street
Boston, Massachusetts 02109
(617) 723-2800
Its Attorney

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